United Nations AT/DEC/1222

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1222

Case No. 1318: OTHIGO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 8 August 2003, Benedict Othigo, a former staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 8 October 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia,:

> "11. ... [*T*]*o find*:
>
> (a) That the recommendations of the [Joint Disciplinary Committee (JDC)], Nairobi, could have been more lenient, given the mitigating circumstances; and
>
> (b) That having found the above to be true, ... to recommend to the Secretary-General the following remedial action: That any of the disciplinary measures (a) (i) to (iv) of rule 110.3 of the Staff Rules ... is more justifiable than the decision to separate from service (vii)."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 28 February 2004;

Whereas the Respondent filed his Answer on 23 January 2004;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

> "**II. Employment History:**
>
> The staff member entered the services of the United Nations Office at Nairobi [(UNON)] as [a] Security Officer at the G-4 level on an initial [six-month] fixed-term contract on 8 August 1989. [His contract was subsequently renewed a series of times, and he served at other duty stations on mission assignment and on secondment.]
>
> ...
>
> **III. The Charges:**
>
> ... By memorandum dated 26 March 2002, the Deputy Chief of Security, UNON, informed the Chief of Security, UNON, of an incident involving fraudulent medical claims in respect to the staff member. In the aforementioned memorandum, the Deputy Chief of Security recounted the ... [following]:
>
> > 'On 5 July 2001, a person who the staff member named as his wife, Mrs. ... Othigo, attended Mater Hospital's antenatal clinic and paid a total of Kshs.800/- for which two receipts were issued. The staff member then submitted [a United Nations Medical Insurance Plan (MIP)] claim form for reimbursement of these two payments. On receipt of the claim, [the United Nations Joint Medical Services (JMS)] informed the staff member that MIP does not cover antenatal visits.
> >
> > On 18 July 2001, the staff member approached [the JMS] and obtained a letter from that service to the Mater Hospital, in which it was stated that his wife, Mrs. ... Othigo, is covered by [MIP] and that the bills for the hospitalization in a general ward should be sent to [the] JMS for settlement.
> >
> > On 2 August 2001, a person was admitted to Mater Hospital as Mrs. ... Othigo, and gave birth to a baby girl called [baby] Othigo. According to the invoices from the hospital, this person was discharged ... on 7 August 2001.
> >
> > On 22 August 2001, the same person was re-admitted to Mater Hospital for treatment as a result of complications after birth. The staff member obtained a second letter from [the JMS] addressed to Mater Hospital dated 23 August in which it was stated that his wife, Mrs. ... Othigo is covered by [MIP] and that the bills for the hospitalization in a general ward should be sent to [the] JMS for settlement.
> >
> > During the second admission (22 August 2001), [the JMS] became suspicious of the admissions to Mater Hospital of Mrs. ... Othigo. This was based on the fact that the staff member had submitted a dental claim with MIP for Kshs.5,500/- for treatment of his wife Mrs. ... Othigo, which included charges for x-ray and it is unusual for patients who are seven months pregnant to undergo x-ray treatment. As a result, on 23 August 2001, [the JMS] sent a staff member, who

happens to know the staff member's wife, to the hospital to confirm her identity. The patient, who answered to the name Mrs. ... Othigo, was not the staff member's wife but was someone she did not know. The matter was then reported to UNON Security and to [the Office of Internal Oversight Services (OIOS)] for investigation. The staff member was sent to OIOS where he recorded a statement in which he admitted having used his recognized spouse's particulars, Mrs. ... Othigo, to have [Ms. X.] admitted into Mater Hospital for treatment.

On 24 August 2001, the staff member obtained an affidavit of marriage in which he alleged that he was married to [Ms. X.] in traditional ritual on 23 June 2001. He forwarded a copy of the aforementioned affidavit to [the Human Resources Management Service (HRMS)] ...

...

... [O]n 5 September 2001, [Ms. X.] was re-admitted for the third time to Mater Hospital as Mrs. ... Othigo but passed away on 8 September 2001 while the staff member was on mission in South Africa.

On 7 September 2001, the Chief, Staff Administration Section, HRMS, wrote to the staff member, explaining that the Marriage Affidavit he had sent to HRMS, was in fact invalid, as the hand-written alterations made in the document had not been witnessed by a Commissioner of Oaths, nor had the document been signed by his second wife, [Ms. X.]. The memorandum also explained to the staff member that [the United Nations] recognizes only one spouse but owing to the traditional practices in the staff member's situation of a second marriage, HRMS requested the staff member to submit a copy of his wife's birth certificate in order for her to be registered as a Spouse-Non Recognized in the staff member's Official Status file.

On 16 September 2001, the staff member obtained an affidavit from a Commissioner of Oaths, in which he swore to being married to two wives, namely, [Mrs. Othigo] - his first wife - and [Ms. X.] - his second wife. He further admitted in the said affidavit that he had on three occasions arranged for his second wife's admission into hospital for treatment using the particulars of his first wife.

On 17 September 2001, another letter was obtained from [the JMS] indicating that Mrs. ... Othigo was covered by MIP and all bills for hospitalization in a general ward should be forwarded to [the JMS]. Although at this time, [the JMS] were fully aware that Mrs. ... Othigo was not the patient who had been treated at Mater Hospital, and that the staff member was being investigated for alleged fraud, this latest letter was raised on compassionate grounds to facilitate the release of the body from Mater Hospital mortuary. At this stage, the staff member had not accepted any liability on his part or given [the JMS] any undertaking to meet the costs incurred for the hospitalization and treatment provided to [Ms. X.] by Mater Hospital.

The UNON Security report concluded that the staff member's actions showed that he attempted to defraud the Organization by having [Ms. X.] assume the identity of his wife Mrs. ... Othigo to have the hospital

expenses incurred during the various admissions paid for by the United Nations Joint Medical Plan.'

... In accordance with the procedures laid out in ST/AI/371 [of 2 August 1991, entitled "Revised Disciplinary Measures and Procedures"], UNON submitted the report from UNON Security to the Assistant Secretary-General, Office of Human Resources Management [(OHRM)] ...

As a result, [OHRM] addressed a memorandum dated 9 October 2002 to the staff member attaching the report and summarizing the facts described therein. At the same time, the staff member was asked to provide a written statement or explanation in response to the allegations. On this occasion, he was informed of his right to counsel.

... The staff member responded by memorandum dated 18 November 2002 in which he stated that the allegations of misconduct and fraudulent medical claims preferred against him [were] untrue, and [he] gave a detailed defence ..."

On 3 December 2002, OHRM advised the Applicant that his case would be submitted to the JDC in Nairobi.

On 12 May 2003, the JDC submitted its report. Its considerations and recommendation read, in part, as follows:

"**VI. Considerations**

...

1. ... [T]he Panel came to the conclusion that the Administration has presented a strong *prima facie* case of misconduct against the staff member.

From the evidence before the Panel it is clear that the staff member has submitted medical claims for a person for whom such entitlements do not exist under [MIP]. ...

... [E]ven if the staff member had been legally married to [Ms. X.], for her to be entitled to the benefits of the MIP plan, the staff member would have had to remove his first wife ... from the plan and replace her with [Ms. X.]. This is because staff members cannot have two spouses as dependent spouses under the [United Nations] Rules and Regulations. Therefore, whichever way one looks at the issue at hand, it is undisputable that the staff member simply was not entitled to the medical benefits he claimed.

2. The staff member has attempted to defend himself with the contention that all this was done in a state of emergency and that this justified his actions. It is doubtful from the outset whether the premise on which this defence is based is tenable. It is based on the highly dubious presumption that an emergency would justify staff members to mislead the Organization about the identity of persons for whom they claim reimbursement of medical expenses. The JDC cannot follow this line of thought. What is more important, however, the JDC must agree with the Administration that a compelling case was not presented by the staff member that on the admissions in question, namely 5 July 2001, 2 August 2001 and 22 August 2001, there indeed existed an emergency which - in each case - would have prevented the staff member from

first obtaining permission or agreement from the Organization to have [Ms. X.] covered under the MIP scheme. It incriminates the staff member further that he attempted reimbursement for [Ms. X.] on the occasion of her antenatal visit to the Mater Hospital on 5 July 2001 and that in the weeks following that visit, he never tried to enroll [Ms. X.] under the MIP scheme.

In sum, the Administration has successfully presented a very strong *prima facie* case of misconduct on the part of the staff member and the staff member was unable to exonerate himself.

3. ... [T]he staff member's misconduct was so serious that the JDC was unable to recommend a disciplinary measure that would allow the staff member to continue his employment within the United Nations.

The Panel therefore had to decide whether to summarily dismiss the staff member or whether to separate him from service with or without notice or compensation in lieu thereof. In this context, the Committee noted that the staff member had been in the services of the United Nations since 1989 and has not been implicated in any previous cases of disciplinary misconduct. The Panel also took into account that the staff member had close personal ties with [Ms. X.] and her child and that her serious illness might have misled the staff member to feel, albeit incorrectly, justified to act in the way he did. The Panel also noted that the staff member seems to have paid his debt with the Mater Hospital so it is unlikely that the Organization will be at risk of being forced into litigation by the Mater Hospital. For the aforementioned reasons, the Panel decided to opt for a recommendation for separation from service with compensation in lieu of three months notice, in line with the established practice of granting three months notice at Nairobi Duty Station.

VII. Recommendations:

In the light of the foregoing considerations and conclusions, the Joint Disciplinary Committee recommends to the Secretary-General that the staff member be separated from service with three months compensation in lieu of notice."

On 10 June 2003, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him that the Secretary-General had decided to accept the JDC's recommendation and to separate him from service with compensation in lieu of notice.

On 8 October 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

His record of service and the facts of his case, including mitigating circumstances, are such that separation from service was a disproportionate sanction.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of conduct required of international civil servants and his actions constituted serious misconduct.

2. The sanction imposed was not disproportionate to the offence.

The Tribunal, having deliberated from 2 to 24 November 2004, now pronounces the following Judgement:

I. The facts of this case are simple and straightforward. The Applicant is fully implicated in false claims made under MIP for medical treatment which was afforded to Ms. X who had sought to pass herself off as Mrs. Othigo, who was the Applicant's wife as recognised by MIP and who was, at all material times, the only lawfully recognised spouse of the Applicant, as made known to the Organization.

II. The Applicant was actively implicated in this attempted deception and in the false claims. When the deception was discovered, he had initially sought to excuse his conduct by claiming that Ms. X should be recognised as his *second wife* and that he was accordingly entitled to have her treatment carried out at the expense of MIP. He now accepts that his participation in these events was mistaken and erroneous, and seeks to argue solely that the sanction of separation recommended by the JDC and imposed upon him by the Respondent for his misconduct was disproportionate. He asks that the Tribunal recommend that a lesser sanction such as a written censure, the loss of one or more steps-in-grade, or some other less onerous disciplinary measure would have been more appropriate.

III. The Applicant initially sought to raise a defence of "claim of right" or of "entitlement" when before the JDC. In the view of the Tribunal, such defences or excuses were always untenable as, had the Applicant believed that Ms. X was entitled to benefit under the insurance scheme and that she was entitled to receive treatment thereunder as his "second wife", no necessary purpose would have been served by seeking to pass her off as Mrs. Othigo. The Tribunal therefore fully endorses the JDC's rejection of the "good faith" defence which had been advanced on behalf of the Applicant.

The Applicant now seeks to confine his submissions to his claims that his actions should be construed as "misguided" or "erroneous", albeit wrongful, rather than fraudulent and to a submission that they were done "in the agony of the moment"

rather than with calm calculation, and he makes an *ad misericordiam* plea that he should, in all the circumstances, have been afforded a greater degree of leniency. He does not advance a claim that he was confused as to which lady had received or was receiving the medical treatment in respect of which the claims were made, so he means erroneous in the sense of conduct which cannot be justified, rather than conduct which was the result of a factual mistake.

IV. In Judgement No. 583, *Djimbaye* (1992), the Tribunal found that "in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors." The Tribunal does not substitute its judgement for that of the Secretary-General, but restricts itself to reviewing whether the decision-making process, and the decision reached, respected the rights of the staff member in question. The Tribunal recalls its Judgement No. 1011, *Iddi* (2001), wherein it stated:

> "[T]he Tribunal has established a number of criteria that must be met in order for a disciplinary measure not to be arbitrary, but to be regarded as in conformity with law (see, in particular, Judgement No. 941, *Kiwanuka* (1999)...) ... They are:
>
> - veracity of the facts;
> - appropriate legal description of the facts;
> - absence of substantive irregularity;
> - absence of procedural irregularity;
> - absence of abuse of discretion;
> - legality of the penalty;
> - proportionality of the penalty.
>
> If a single one of these criteria is not met, the penalty is unjustified and should be remedied by the Tribunal."

In the opinion of the Tribunal, in the case at hand it was appropriate and proper for the Respondent to have characterised the Applicant's conduct as fraudulent. It was carried out over a period of time and it was followed by the Applicant's clearly spurious attempts to justify it. Under the circumstances, the Tribunal cannot find that the sanction of separation was excessive or disproportionate. The Respondent is clearly entitled to take the view that a person who engages in the perpetration of fraud against the Organization is unfit to remain in service. Such conduct is quite incompatible with

the high standards which the Respondent is entitled to expect from a staff member of the United Nations. Some may consider it all the more reprehensible when carried out by a person employed in maintaining the security of the Organization, and such a viewpoint cannot be considered as unreasonable.

V. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary